No. 96-1133

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1133

UNITED STATES OF AMERICA, PETITIONER

v.

EDWARD G. SCHEFFER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

REPLY BRIEF FOR THE UNITED STATES

1. Respondent's argument that Military Rule of Evidence 707 abridges the Sixth Amendment rests principally on two propositions: (1) that a criminal defendant has a "fundamental right" to lay a foundation for any potentially exculpatory evidence; and (2) that polygraph evidence has achieved sufficient reliability that no institutional rulemaker—President, Congress, or state legislature—may impose a per se ban on such evidence. Those arguments misstate the constitutional requirements for trials and misapply the applicable principles in the context of polygraph evidence.[1]

[1] Respondent notes that, in *United States* v. *Posado*, 57 F.3d 428, 432 (5th Cir. 1995), "the United States agreed that a *per se* rule against admitting polygraph evidence was no longer viable after *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Respondent believes the United States' position in

a. Respondent's assertion of a "fundamental right" to lay a foundation for the introduction of polygraph evidence is incorrect for several reasons. First, this Court has repeatedly looked to whether the rule imposed is "arbitrary or disproportionate to the purposes [it is] designed to serve." *Rock* v. *Arkansas*, 483 U.S. 44, 56 (1987). As we explained in our opening brief (Gov't Br. 15-17), a per se rule is no more suspect than an individual judge's ruling in a particular case if the societal "interests served by [the] rule justify [its] limitation." *Rock*, 483 U.S. at 56. See also *Michigan* v. *Lucas*, 500 U.S. 145, 151 (1991). Respondent suggests that every defendant has a constitutional right to "lay a foundation" to present any potentially exculpatory evidence, however generally unreliable it may be and irrespective of the legitimate interests underlying a categorical exclusion of such evidence.[2] Respondent does not, however, cite any lower court decisions (other than the decision below) applying that principle to hold that a defendant has a

---

Posado is the correct approach for a constitutional analysis." Resp. Br. 6. *Posado* involved Fed. R. Evid. 702 and the standard to be applied in determining the admissibility of scientific evidence. It did not involve the constitutionality of any rule relating to the admissibility of such evidence.

[2] Respondent suggests that, because Military Rule of Evidence 707 does not contain an exception for capital sentencing, it must therefore be unconstitutional for all purposes. See Resp. Br. 7 n.3. Since respondent's case does not implicate any of the issues that would arise in a capital case, this Court need not consider whether a per se rule prohibiting polygraph evidence would be unconstitutional if applied to bar mitigation evidence in a capital sentencing proceeding.

constitutional right to lay a foundation for the introduction of exculpatory polygraph evidence.[3]

Nor do the cases cited by respondent from this Court support his assertion of a "fundamental right" to "attempt to lay a foundation for the admission of exculpatory scientific evidence at his court-martial, * * * and to present that favorable evidence if the proper evidentiary foundation is established," regardless of Rule 707. Resp. Br. 7. See *Taylor* v. *Illinois*, 484 U.S. 400 (1988); *Rock*, 483 U.S. at 44; *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); and *Washington* v. *Texas*, 388 U.S. 14 (1967).

In *Taylor*, this Court found no Sixth Amendment violation in a trial judge's exclusion of a defense witness as a discovery sanction for failing to identify the witness in a timely fashion before trial. 484 U.S. at 413-414. And the remaining cases are collectively distinguishable in at least three ways.[4] First, in each the Court considered a restriction on a defendant's ability to introduce testimony of a witness who was present at the scene of the crime and had first-hand knowledge of the facts. See *Rock*, 483 U.S. at 57 (rule prevented defendant "from describing any of the events that occurred on the day of the shooting"); *Chambers*, 410 U.S. at 295 (testimony sought related to inconsistencies in out-of-court statements that another person committed the murder); *Washington*,

---

[3] The cases cited by respondent that have permitted a defendant to lay a foundation for the admission of polygraph results did so by applying the rules of evidence, which are promulgated by legislatures and courts but are not, except in a few circumstances, compelled by the Constitution. See Resp. Br. 37-43.

[4] In *Chambers* the Court also specifically limited its holding to "the facts and circumstances of [t]his case." 410 U.S. at 303.

388 U.S. at 16 (testimony excluded was from "the only person other than [defendant] who knew exactly who had fired the shotgun and whether [defendant] had at the last minute attempted to prevent the shooting"). Polygraph evidence is quite different, however, because the examiner has no first-hand knowledge of the facts but instead is basing testimony on inferences drawn about the believability of the defendant in an examination after the events charged.

Second, in each case the Court concluded that adequate assurances existed for the reliability of the testimony that had been excluded. See *Rock*, 483 U.S. at 58-61 (hypnotically refreshed testimony sufficiently reliable when used with appropriate procedural safeguards); *Chambers*, 410 U.S. at 300 (out-of-court statements that had been excluded by the trial judge as inadmissible hearsay were made in "circumstances that provided considerable assurance of their reliability"); *Washington*, 388 U.S. at 23 (state rule barring testimony of alleged accomplice "leaves him free to testify when he has a great incentive to perjury, and bars his testimony in situations where he has a lesser motive to lie"). For the reasons given in our opening brief (Gov't Br. 18-26) and pages 5-11, *infra*, polygraph evidence lacks similar assurances of reliability and, contrary to respondent's unsupported assertions, there is no specific reason to think the polygraph administered to respondent produced a reliable and accurate assessment of his truthfulness.

Third, in each case the application of the evidentiary or procedural rule fell disproportionately on the defendant. Thus, in *Chambers* the combination of the rule that parties "vouch" for their witnesses and thus cannot impeach them, when combined with the hearsay rule, had a particularly severe effect on the defendant in that case who was surprised by the in-court change-of-positions by a person called to testify on the defendant's behalf. Similarly, the hypnotically refreshed recollections excluded in *Rock* were those of the defendant—a unique form of evidence for which no substitute is available in a defense case. And in *Washington*, the rule under challenge expressly prohibited accomplices from testifying on behalf of the defendant. Here, a polygraph examination that has an inculpatory result is banned for the same reasons that one with an exculpatory result is excluded.

Ultimately, respondent concedes (Resp. Br. 12) that "an accused's right to present relevant evidence is not absolute," but then asserts that that principle "should not extend to *per se* exclusions of an *entire class* of exculpatory evidence. * * * Though evidentiary rules may sometimes exclude relevant, exculpatory evidence, there are limits that prevent the exclusion of entire categories of evidence for all time." *Id.* at 13. Respondent offers no explanation for what those "limits" might be. As we have demonstrated, however, a per se rule like Military Rule of Evidence 707 is constitutional unless it is "arbitrary" and not supported by legitimate justifications. See *Montana* v. *Egelhoff*, 116 S. Ct. 2013, 2022 (1996) (plurality opinion); *Lucas*, 500 U.S. at 151; *Rock*, 483 U.S. at 56.

b. The legitimate doubts that exist about polygraphy amply support a conclusion that prohibiting testimony based on such examinations is constitutional. Although respondent and his *amici* go to considerable lengths to try to establish that "polygraph evidence is sufficiently reliable in particular cases, and can be very critical to a defendant's case" (Resp.

Br. 10), polygraph evidence is inherently unreliable as evidence in a trial.

First, there is no way of knowing whether a polygraph is, in fact, reliable in any given case. Polyraph test results are not replicable. A person found nondeceptive in an examination at one particular point in time might be found deceptive as to the same questions at a different point in time. Respondent and his *amici* do not dispute our contention (Gov't Br. 23) that such factors as amount of sleep, ingestion of coffee and other stimulants, and stress may alter the test results on a given day. The non-replicability of the test is compounded by the subjective nature of the results adduced by the examiner. Later analysis of test results by a person not in the examination room cannot provide sufficient assurance of reliability in a given examination. Regardless of how well trained a particular examiner might be, whether a person "passes" or "fails" the test will depend on what inferences the examiner draws from the results because there is no common physiological response known to be unique to deception.[5]

---

[5] Respondent's observation (Resp. Br. 25) that government polygraph examiners are well trained is essentially irrelevant to the constitutional analysis of whether all defendants have a Sixth Amendment right to lay a foundation for the admission of exculpatory polygraph evidence. The government examiners are trained for the investigative purposes for which polygraphs are used by the Federal Government, and not to produce evidence or testimony designed to meet the standards of reliability that govern the admissibility of evidence in a criminal trial. As we have noted (Gov't Br. 23-24), the overwhelming majority of polygraphers in the United States have not been trained by the Federal Government, and are not required by any national accrediting board to meet any uniform national standards before becoming polygraphers.

Not only is the reliability of polygraphs open to serious doubt because of their subjectivity and non-replicability, an individual's ability to pass a polygraph by using undetectable countermeasures makes polygraphs even more suspect as reliable evidence in a courtroom. See Gov't Br. 24-25. In attempting to downplay the potential for countermeasures to skew the reliability of polygraphs, respondent suggests only that "spontaneous * * * countermeasures" have been found ineffective, and cites a study by C. Honts, D. Raskin, and J. Kircher, who are generally known to be advocates of polygraphy. See Resp. Br. 24. That study, however, found that a simple "physical countermeasure (biting the tongue or pressing the toes to the floor) or a mental countermeasure (counting backward by 7) * * * enabled approximately 50% of the [subjects] to defeat the polygraph test." C. Honts et al., *Mental and Physical Countermeasures Reduce the Accuracy of Polygraph Tests*, 79 J. A. Psych. 252, 252 (1994). Those researchers further found that: "effective mental countermeasures * * * are virtually undetectable instrumentally" (*id.* at 253); a person who trained in countermeasures for "no more than 30 min[utes]" significantly enhanced his ability to defeat the accuracy of a polygraph (*id.* at 257); and their "findings are consistent with prior research demonstrating that physical countermeasures are effective and are difficult to detect" (*ibid.*). That study was conducted in laboratory conditions, and the authors note that "it is unclear how countermeasures can be studied systematically in the field because successful use of countermeasures would be nearly impossible to identify in the context of most field examinations." *Id.* at 258. For a criminal suspect who would derive

the greatest forensic benefit from being found non-deceptive in a polygraph, therefore, even respondent's source establishes that efforts to fool the polygrapher will succeed a significant percentage of the time.[6] It is not arbitrary to impose an evidentiary limitation on a form of evidence so readily susceptible to manipulation by persons with a strong self-interest in doing so.

Finally, even if it is true that "leading practitioners in the field of polygraph[y] fiercely support its use, utility and reliability" (Resp. Br. 17), that support does not translate into a belief among scientists and polygraphers that polygraph evidence is sufficiently reliable to be admissible as evidence in a court of law or court-martial. Even respondent's citations support our position that polygraphy is used most effectively as an investigative tool. *Ibid.* As we explain in our opening brief (Gov't Br. 34 n.17), the Federal Government's use of polygraphy as an investigative method, however, does not mean that polygraph results are entitled to admissibility. An important distinction exists between a tool that may facilitate the obtaining of a confession or other information in an investigation and a technique whose reliability is sufficiently questioned that it should not be admitted into evidence.[7] In the most recent survey

[6] Respondent's fallback position is that "[a]ny possible problem with countermeasures in a given test is best explored through the time-honored mechanism of cross-examination." Resp. Br. 24. That response, however, begs the question of why polygraph results are needed at all at trial, if a defendant can testify in his own defense and successfully withstand cross-examination.

[7] The government employs a wide variety of techniques to attempt to obtain information and solve crimes, even though the information generated and preserved by those methods may be insufficiently reliable to be admissible into evidence. The notes taken by investigators reflecting their impressions about potential witnesses are helpful in the investigative process, for example, but they are inadmissible except in extraordinary circumstances. Similarly, arrest records of persons are very useful to investigators in generating leads and clues, but they are not admissible as proof of guilt of a charged crime. The gut instincts of a trained investigator can be very valuable to the hard work of solving a crime, but those instincts are not probative evidence of wrongdoing by a defendant, so an officer cannot testify to a jury that his instincts cause him to believe the defendant committed the offense. As the Brief *Amicus Curiae* of the Criminal Justice Legal Foundation In Support of Petitioner notes (at 15), polygraph's "ability to generate confessions is the most likely reason for the continued use of the polygraph by law enforcement and security personnel."

of professional polygraphers, less than 30 percent of the members of the American Polygraphy Association and the Society for Psychophysiological Research would "advocate that courts admit into evidence the outcome of control question polygraph tests, that is, permit the polygraph examiner to testify before a jury that in his/her opinion, either defendant was [deceptive or truthful] when denying guilt." W. Iacono & D. Lykken, *The Validity of the Lie Detector: Two Surveys of Scientific Opinion*, 82 J. Applied Psych. 426, 430 (1997). And less than 36 percent of the respondents agreed that the control-question technique "is based on scientifically sound psychological principles or theory." *Ibid.*

Respondent argues (Resp. Br. 19-23) that various studies have ostensibly established the reliability of polygraphy. As we noted in our opening brief (Gov't Br. 18-21), polygraphy is a polarized field of inquiry that has its fervent proponents and skeptics. But no one can ever be satisfied that the behavioral analysis inherent in polygraphy is correct, because there is

no objectively verifiable method of determining the accuracy of a polygraph examination. Laboratory studies cannot replicate the actual conditions—fear, concern, stress—that are present when a person is polygraphed while under suspicion for having committed an offense. Field studies rely on other evidence of guilt and have the tendency to overstate the efficacy of polygraphs because a finding of deception will result in further interrogation, which produces additional (often inculpatory) information, whereas a finding of non-deception will often result in no additional interrogation. Accordingly, the studies on which respondent and his *amici* rely have been criticized on any number of different grounds, including insufficient sample size, inability to replicate real testing conditions, lack of appropriate controls over relevant information, and other methodological shortcomings. See generally W. Iacono & D. Lykken, "The Scientific Status of Research on Polygraph Techniques: The Case Against Polygraph Tests," in 1 *Modern Scientific Evidence* §§ 14-3.1.1 to 14.3.3.5 (D. Faigman et al. eds. 1997).

In that respect, polygraphy is unlike the other types of scientific evidence cited by respondent. There is some readily observable and comprehensible basis for understanding comparisons between samples of DNA, handwriting, and fingerprints. Our scientific understanding of those fields is sufficient to accept that a person will produce the same DNA in different samples, generally form letters in the same handwriting style, and leave fingerprints looking the same. Our understanding of the "science" of polygraph has not led to agreement on any similar universal understandings. Indeed, one of the few points on which both proponents and skeptics of polygraphs

agree is that "there is no serious scientific support for" the notion that "certain patterns of physiological response * * * are specifically indicative of lying." W. Iacono & D. Lykken, *supra*, § 14-3.1.1, at 583; see also D. Raskin, *The Polygraph in 1986: Scientific, Professional and Legal Issues Surrounding Application and Acceptance of Polygraph Evidence*, 1986 Utah L. Rev. 29, 31 ("No known physiological response or pattern of responses is unique to deception."). Respondent contends that "[t]he concern that evidence may be unreliable in certain situations does not warrant a per se ban on admissibility in all situations." Resp. Br. 29. Unlike other forms of evidence, however, there is no way of knowing whether any given polygraph result is "reliable."[8] To use this case, for example, it is impossible to replicate respondent's polygraph examination, to ascertain whether he employed countermeasures to evade a finding of deception, to determine whether ingestion of chemicals or the existence of environmental factors influenced the outcome of his polygraph, or to know whether the examiner's evaluation was correct.

c. In addition to the unreliability of polygraphs, respondent also disputes the other reasons given by the President for promulgating Military Rule of Evidence 707. Respondent's counterarguments, however, do not satisfy his high burden of establishing that the justifications underlying the President's decision are invalid.

First, with respect to the intrusion on jury functions by polygraph evidence, respondent contends

---

[8] Indeed, the rules of evidence generally bar opinions (whether lay or expert) on whether witness was credible on a particular occasion. See Fed. R. Evid. 608(a); *United States* v. *Azure*, 801 F.2d 336, 339-340 (8th Cir. 1986).

(Resp. Br. 29-31) that the available information on the effect of polygraph testimony on juries is that juries are not unduly influenced, yet he acknowledges that "empirical data regarding the impact of scientific testimony on juries is almost entirely lacking." *Id.* at 30 (quoting *State* v. *Porter*, 241 Conn. 57 (1997)). As we noted in our opening brief (Gov't Br. 26-27), courts have frequently expressed the view that polygraphs distort the jury's fact-finding mission.[9]

Next, with respect to the President's concern that admission of polygraph evidence would lead to unproductive, collateral litigation, respondent contends that "highly technical, time consuming, scientific evidence is admitted *against* accuseds every day in our criminal justice system." Resp. Br. 35. Respondent cites surveys showing that polygraph testimony does not take very much time in trials. Those surveys are belied by the experience of actual cases. See Gov't Br. 30-31. See also Brief *Amicus Curiae* Connecticut et al. in Support of Petitioner 16-17 (describing experience of States). Respondent's contention (Resp. Br. 36) that "the admission of polygraph evidence in this case would not have wasted the court's time or burdened the military justice system" overlooks the collective impact of disputes over polygraph evidence on the judicial system.

---

[9] Respondent maintains (Resp. Br. 34) that polygraph testimony does not usurp the functions of the jury because "[t]he polygraph examiner would only testify that the responses to relevant questions indicated 'no deception,' not that, in the examiner's opinion, the examinee did not commit the crime alleged." Given that the applicable control question will typically ask for a direct answer of whether the subject committed the offense, respondent's distinction is surely one without a difference.

Finally, notwithstanding the long recitation of cases by respondent (Resp. Br. 37-38 & n.37), only one State permits polygraph evidence to be admitted over a party's objection—*i.e.*, in the absence of a stipulation between the parties. All other States either have imposed a per se prohibition on the admission of polygraph results or permit such evidence only by stipulation.[10] The cases cited by respondent do not support his assertion that "numerous state courts have found polygraph evidence to be reliable." Resp. Br. 41 (citing *Commonwealth* v. *Mendes*, 547 N.E.2d 35, 36-37 (Mass. 1989), which reversed Massachusetts' 15-year experiment with polygraph evidence by reinstituting a per se ban; and *State* v. *Porter*, 694 A.2d 1262, 1282 (Conn. 1997), which upheld the State's per se ban on polygraph evidence while also holding that *Daubert*, rather than *Frye*, was the appropriate standard for the admissibility of scientific evidence under state evidentiary rules).[11] Similarly, respon-

---

[10] Although respondent states that "[t]wenty two states allow polygraph evidence to be admitted in their jurisdictions in one form or another" (Resp. Br. 38), in all but one of those States (New Mexico), polygraph evidence is admissible only by stipulation of both parties. The Vermont Supreme Court has not addressed the issue. See *State* v. *Hamlin*, 499 A.2d 45, 53-54 & n.4 (1985).

[11] Likewise, in the post-*Daubert* federal cases cited by respondent (Resp. Br. 37), the court of appeals did not uphold the admissibility of polygraph evidence, but rather held that the standard for determining admissibility is *Daubert*, and not *Frye*. And those courts expressed doubts about whether polygraph evidence would be admissible in view of Federal Rule of Evidence 403. See, *e.g.*, *United States* v. *Cordoba*, 104 F.3d 225, 227-228 (9th Cir. 1997); *United States* v. *Williams*, 95 F.3d 723, 729 (8th Cir. 1996), cert. denied, 117 S. Ct. 750 (1997); *United States* v. *Posado*, 57 F.3d 428, 434 (5th Cir. 1995). Thus, although it is true that the federal courts of appeals no

dent's statement that "[t]here is no widespread judicial support for a *per se* prohibition on polygraph evidence" (Resp. Br. 41) is belied by his acknowledgment that 27 States have per se prohibitions on the admission of polygraph evidence in criminal proceedings (*id.* at 38). Respondent thus relies on the experience of New Mexico, the lone State to permit polygraph evidence over the objection of a party. The experience of that one State does not render it arbitrary for the President to reach a contrary conclusion about the costs of admitting polygraph evidence.

2. If the Court agrees that the Sixth Amendment does not require admission of polygraph evidence, it need not reach our alternative submission that the military rule is entitled to special deference. Respondent makes three attacks on that submission, each of which lacks merit.

First, respondent asserts (Resp. Br. 43) that Military Rule of Evidence 707 is not entitled to special deference because "[n]one of the reasons set forth in the drafter's analysis to Mil. R. Evid. 707 indicates the rule was created out of a concern for the unique nature or structure of the military." No decision of this Court requires the President or Congress to articulate that a particular rule is special to the military before affording it deference. In *Weiss* v. *United States*, 510 U.S. 163 (1994), for example, this Court did not compel a special justification by Congress for the method of appointing military judges before recognizing the political branches' "plenary control over rights, duties, and responsibilities in the

---

longer are invoking *Frye* for a per se rule against the admission of polygraph evidence, the reported decisions establish a great deal of skepticism about the reliability and probative value of polygraphs.

framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." *Id.* at 177. Nor did the Court require special justification in assessing a First Amendment vagueness challenge to a statute that applied to the military. See *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("For the reasons which differentiate military society from civilian society, we think Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter."). Finally, in upholding against Fifth and Sixth Amendment challenges a rule that denied counsel for military personnel in summary courts-martial, the Court in *Middendorf* v. *Henry*, 425 U.S. 25 (1976), did not discuss—much less require—any particularized explanation differentiating military and civilian proceedings in the promulgation of that Uniform Code of Military Justice rule. See *id.* at 43-45.

Second, respondent argues that the court of appeals is entitled to deference, and not the President. Resp. Br. 46. As Commander in Chief, however, the President has both a constitutional duty and a statutorily delegated authority to establish rules of evidence in military courts-martial. See U.S. Const. Art. II, § 2, Cl. 1; 10 U.S.C. 836(a). As a creation of Congress, the Court of Appeals for the Armed Forces has neither a constitutional nor a statutory role in the promulgation of those rules. Thus, although that court must discharge its responsibility to rule on constitutional challenges to the rules, its finding of unconstitutionality must be reviewed against the backdrop of the judicial deference that "is at its apogee" (*Weiss*,

510 U.S. at 117) when courts review decisions by the political branches in this area.[12]

Finally, respondent argues (Resp. Br. 46) that because "officers are assigned as military judges, circuit defense counsel, and circuit trial counsel whose sole jobs are to try courts-martial throughout the world," there is no continuing merit to this Court's observation two decades ago that "[t]he introduction of procedural complexities into military trials is a particular burden to the Armed Forces because virtually all the participants * * * are members of the military whose time may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf* v. *Henry*, 425 U.S. 25, 45-46 (1976); see also Gov't Br. 42-43. But the Nation's defense is better served by applying scarce

[12] *Amicus* Navy-Marine Corps Appellate Defense Division posits that "Congress intended the Court of Appeals for the Armed Forces' decisions to have greater weight than the President's in issues of constitutional law that are intertwined with issues of military justice." Amicus Br. 9. There is no support for that assertion. *Amicus* further asserts that this "Court is ill-equipped to perform" an assessment of whether the President's justifications for imposing Mil. R. Evid. 707 "justify the exclusion," because the Court "does not have the knowledge to know if the President is correct because of the intricacies of military discipline and courts-martial." Amicus Br. 10-11. From those premises, *amicus* then contends that this Court "should show deference to the lower court's judgment" because Congress entrusted a military court of appeals with the authority to review courts-martial, having divested the President and his military officers of that role. But although Congress created a Court of Appeals for the Armed Forces to hear certain appeals from military disciplinary proceedings, Congress specifically delegated to the President the task of promulgating rules of evidence and procedure in courts-martial. 10 U.S.C. 836(a).

resources to our external foes than to "possibly protracted disputes" (*ibid.*) over whether a polygraph result should be admitted into evidence in any given disciplinary proceeding. An even greater number of specialized military personnel would likely be needed to handle disciplinary matters if respondent's view is to prevail, since the introduction of polygraphs as evidence brings complications to cases that do not exist with Military Rule of Evidence 707 in effect. See Gov't Br. 29-31, 42-43.

If the Sixth Amendment is not offended when the President and Congress determine that counsel is not required at a summary court-martial, *Middendorf*, 425 U.S. at 48, or that a military defendant's access to compulsory process for obtaining evidence may be regulated by the prosecution, *O'Callahan* v. *Parker*, 395 U.S. 258, 264 n.4 (1969), there is no constitutional infirmity to a Military Rule of Evidence that even-handedly proscribes the admissibility of polygraph evidence for both the prosecution and defense.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General

SEPTEMBER 1997